Supreme Court, U.S.
FILED

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No.

In the Supreme Court of the United States

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

CARLOS ENRIQUE SILVA-JACINTO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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35 pp

QUESTION PRESENTED

Whether the court of appeals exceeded the scope of its review when, having overturned a determination by the Board of Immigration Appeals (BIA) that an alien had not established that his fear of persecution was objectively reasonable for purposes of obtaining asylum in the United States, the court itself determined that the alien is eligible for asylum, rather than remanding the case to the BIA for it to address in the first instance the remaining issues relevant to the alien's eligibility for asylum.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Immigration and Naturalization Service, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The memorandum order of the court of appeals, as amended (App., *infra*, 1a-4a), is not published in the *Federal Reporter*, but is reprinted at 37 Fed. Appx. 302. An earlier memorandum order of the court of appeals (App., *infra*, 5a-7a) is reprinted at 31 Fed. Appx. 490. The opinion of the Board of Immigration Appeals (App., *infra*, 8a-11a) and the oral decision of the immigration judge (App., *infra*, 12a-20a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 2002. A petition for rehearing was denied on June 11, 2002 (App., *infra*, 1a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 101(a)(42)(A) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(42)(A), provides:

> The term "refugee" means * * * any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion[.]

2. Section 1105a of Title 8 of the United States Code (1994) provided in pertinent part:

> **Judicial review of orders of deportation and exclusion**
>
> **(a) Exclusiveness of procedure**
>
> The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States * * * , except that—
>
> * * * * *

(4) Determination upon administrative record

* * * the petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive[.]

3. Section 1158(a) of Title 8 of the United States Code (1994) provided:

Establishment by Attorney General; coverage

The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

STATEMENT

1. The Immigration and Nationality Act (INA) defines the term "refugee" to mean an alien who is unwilling or unable to return to his home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). An alien who is a refugee is eligible to be considered for asylum in the United States, provided that the alien is not disqualified from consideration because of past conduct.

See 8 U.S.C. 1158 (1994).[1] The Attorney General is vested with discretion whether to grant asylum to an eligible refugee. 8 U.S.C. 1158(a) (1994).

The asylum applicant has the burden of proving that he is a refugee. 8 C.F.R. 208.13(a). An asylum applicant who establishes that he suffered past persecution on account of a statutorily protected characteristic is rebuttably presumed to have a well-founded fear of future persecution. 8 C.F.R. 208.13(b)(1). That presumption may be rebutted if the immigration judge (IJ) finds that there has been a fundamental change in circumstances such that the asylum applicant no longer has a well-founded fear of persecution on account of one of the protected grounds.[2] *Ibid.* The IJ's asylum decision—like other rulings by an IJ in deportation proceedings brought against an alien—is appealable to the Board of Immigration Appeals (BIA). The BIA has the power to conduct a *de novo* review of the record, to

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[1] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-575 to 3009-627, revised the INA's provisions for obtaining relief from deportation. See, *e.g.*, 8 U.S.C. 1158 (1994); 8 U.S.C. 1231(b)(3). In Section 304(a) of IIRIRA, 110 Stat. 3009-587 to 3009-593, Congress established a new form of proceeding known as "removal," which applies to aliens who have entered the United States but are deportable, as well as to aliens who are excludable at the border. See 8 U.S.C. 1229, 1229a. Those amendments do not govern the present case because they apply only to applications for relief from deportation filed by aliens who were placed in removal proceedings on or after April 1, 1997. IIRIRA § 309(a), 110 Stat. 3009-625.

[2] In addition, under a recent amendment to the Justice Department's implementing regulations, the presumption may be rebutted if the applicant could avoid future persecution by taking reasonable steps to relocate within the country of removal. 8 C.F.R. 208.13(b)(1)(i)(B).

make its own findings of fact, and to determine independently the sufficiency of the evidence. See, *e.g.*, *Elnager* v. *INS*, 930 F.2d 784, 787 (9th Cir. 1991).[3]

2. Respondent is a native and citizen of Guatemala, who entered the United States unlawfully and without inspection in April 1991. App., *infra*, 13a. The Immigration and Naturalization Service (INS) commenced deportation proceedings against respondent in May 1993. A.R. 141-145. Respondent conceded that he is deportable from the United States, but applied for asylum and withholding of deportation to Guatemala.[4] App., *infra*, 13a. On April 26, 1994, after a hearing, an IJ denied respondent's applications for protection from deportation. *Id.* at 12a, 20a.

At the hearing, respondent testified that he was a sergeant in the Guatemalan military before being honorably discharged in April 1990 after two and a half years of compelled service. App., *infra*, 10a, 15a-16a. Respondent said that he was solicited three times before his discharge to join an investigative branch of the Guatemalan military known as G-2, which

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[3] An asylum claim filed by an alien who has not yet been placed in removal proceedings is decided by an asylum officer. See 8 C.F.R. 208.2, 208.9-208.12. Asylum officers' decisions are not appealable to the BIA.

[4] If the Attorney General determines that an alien's "life or freedom would be threatened" in the country of deportation on account of race, religion, nationality, membership in a particular social group, or political opinion, the alien may be eligible for "withholding of deportation or return." 8 U.S.C. 1253(h)(1) (1994). To be entitled to withholding of deportation, the alien must demonstrate a "clear probability of persecution." *INS* v. *Stevic*, 467 U.S. 407, 430 (1984); 8 C.F.R. 208.16(b) (applicant bears burden of proving eligibility for withholding). If the alien makes such a showing, withholding of deportation (unlike the discretionary relief of asylum) is mandatory. 8 U.S.C. 1253(h)(1) (1994).

respondent testified is known for torturing and killing suspects. *Id.* at 16a; see A.R. 113-114 (asylum application). Respondent testified that he does not agree with G-2's methods, at least in part for religious reasons. *Ibid.* But respondent told the G-2 recruiters only that he wanted to return to civilian life to live with his wife. *Ibid.*

Respondent further testified that one month after his discharge, two men asked him if he was involved in any ventures other than the restaurant where he worked, and why he had not accepted the invitation to join G-2. Respondent replied that he served in the army only for the duration of his compulsory service and had no interest in making the military a career. App., *infra*, 16a. Respondent also testified that one month later, two other individuals approached him at the restaurant where he worked, addressed him by name, and asked him about his former military service, why he left the military, and whether he wanted to be a "specialist." *Id.* at 17a. Respondent testified that one month later, after he had moved to another town in Guatemala, he was followed by black vehicles with tinted windows. *Id.* at 10a, 17a. Respondent said that those encounters made him afraid that G-2 might harm or kill him. *Ibid.*

The IJ found respondent's testimony credible and that respondent "earnestly fears persecution if he is required to return to Guatemala" (App., *infra*, 19a), but also that "respondent's statements concerning his fear of the G-2 are very generalized" (*id.* at 18a). Aside from the conversations described by respondent, the IJ found no indication that G-2 attempted to recruit respondent after he left the military. *Ibid.* The IJ held that in the absence of more concrete evidence of a threat, respondent's "subjective fears and beliefs standing alone are insufficient to establish a well-founded

fear of persecution" for purposes of establishing eligibility for asylum. *Id.* at 19a. The IJ likewise determined that respondent failed to meet the "heavier" burden of establishing the clear probability of persecution necessary to demonstrate an entitlement to withholding of deportation. *Id.* at 20a.

3. The BIA agreed with the IJ that respondent had not demonstrated that his fear of persecution if returned to Guatemala is objectively reasonable, and therefore dismissed respondent's appeal. App., *infra*, 10a-11a. The BIA noted that although respondent had submitted evidence of atrocities committed by G-2 against political opponents and leftist guerillas, that evidence did "not shed light on the likelihood of the G-2 forces harming a former military sergeant who declined their invitation to join them." *Ibid.*

4. On March 5, 2002, the United States Court of Appeals for the Ninth Circuit granted respondent's petition for review and held unanimously that respondent is eligible to be considered for the discretionary relief of asylum. App., *infra*, 5a-7a. The court stated that the record compelled the conclusion that respondent's fear of persecution was objectively reasonable. The court based that inference entirely upon its belief that respondent was "told that his 'name would go on a list'—a statement that meant he was marked for death if he persisted in refusing to join the G-2." *Id.* at 6a. The court then rejected the INS's position that, in the event that the court set aside the INS's determination that respondent's fear of persecution was not objectively reasonable, the case should be remanded to the BIA for consideration of whether the persecution feared by respondent was "on account of" a ground protected by the INA's asylum provision. The panel reasoned that the government had "waived" the right

to a remand on "the 'on account of' issue" by failing to raise the issue during the administrative proceedings and that, in any event, the court's "review of the record independently indicates ample proof that [respondent] has satisfied the requirement." *Id.* at 6a n.3.

The INS filed a timely petition for panel rehearing. In that petition the INS pointed out, *inter alia*, that respondent had never alleged that he was told his name would go on a list of persons to be killed.[5] Nevertheless, on June 11, 2002, the court of appeals entered an order withdrawing its original opinion, substituting an amended opinion, and denying the INS's petition for rehearing (App., *infra*, 1a), in which the court repeated its statement that respondent "was told that his 'name would go on a list'" (*id.* at 2a) and held that "a reasonable fact finder would be compelled to conclude that [respondent] had a well-founded fear of persecution" (*id.* at 3a-4a). This time, the court did not further hold that the INS had waived the right to request a remand to the BIA for consideration of whether any persecution of which respondent had a well-founded fear was "on account of" a protected characteristic. Nevertheless, the panel majority determined that a remand was not warranted because, in its view, the administrative record "compels" the conclusion that the future persecution feared by respondent was based on the protected ground of political opinion. *Id.* at 3a.

Judge Noonan dissented. He noted that respondent presented no evidence that G-2 was aware of his religious beliefs or opposition to G-2's activities. App., *infra*, 4a. Based upon the evidence in the record, Judge

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[5] Respondent testified that he *feared* that he was on a list of people that G-2 would "go after." A.R. 71; see A.R. 114 (asylum application) ("I am afraid that they put my name on such a list.").

Noonan concluded that the persecution respondent feared "might have been based on a simple refusal to serve" in that unit, "not a protected ground." *Ibid.*; see generally *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481-483 (1992). Because the IJ and the BIA—having found that respondent lacked a well-founded fear of future persecution—did not address whether any future persecution that respondent feared was "on account of" a protected characteristic, Judge Noonan concluded that the case should be remanded to the BIA for further findings on that question. App., *infra*, 4a.

REASONS FOR GRANTING THE PETITION

1. The question presented for review in this case is whether, when a court of appeals rejects the Board of Immigration Appeals' particular grounds for finding that an asylum applicant failed to establish eligibility for asylum, the court should remand to the BIA for further proceedings on any questions that the BIA reasonably did not address, but that have become necessary to decide in light of the court of appeals' decision. Petitions presenting the same question are pending before the Court in *INS* v. *Chen*, No. 02-25 (petition filed July 3, 2002) (Question 2), and *INS* v. *Ventura*, No. 02-29 (petition filed July 5, 2002), both of which (like this case) arise from the Ninth Circuit. The Solicitor General has suggested that the petitions in *Chen* and *Ventura* should both be granted and that the cases should be consolidated for oral argument. See *Ventura* Pet. at 15.

2. It is a fundamental premise of administrative law, grounded in separation of powers principles, that when a court reviews an agency decision, "the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency]

for reconsideration." *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952). "If the record before the agency does not support the agency action * * *, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985).

Congress has expressly vested the responsibility for administering the immigration laws generally, and the INA's asylum provisions in particular, in the Attorney General. See 8 U.S.C. 1103, 1158 (1994). The Attorney General (acting though the BIA) accordingly should have been given the first opportunity to determine what further proceedings may be required in this case in light of the court of appeals' reversal of the BIA's determination that respondent lacked a well-founded fear of persecution, as well as what conclusions can be drawn from the record in the remand proceedings. See *Chen* Pet. at 20-27; *Ventura* Pet. at 10-12.

Specifically, the BIA should be allowed to determine in the first instance whether the retaliation feared by respondent was on account of his political opinion or some other characteristic protected under the asylum law, as distinguished from respondent's mere failure to join G-2 (which would not be a protected ground, see *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481-483 (1992)). If the BIA were to find that the persecution feared by respondent was on account of a protected characteristic, then the BIA could next determine whether respondent's fear of persecution remains well-founded despite the passage of time since respondent's departure from Guatemala.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of the petitions for a writ of certiorari in *INS* v. *Chen*, petition for cert. pending, No. 02-25 (filed July 3, 2002), and *INS* v. *Ventura*, petition for cert. pending, No. 02-29 (filed July 5, 2002), and then should be disposed of as appropriate in light of the final dispositions of those cases.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

SEPTEMBER 2002

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-71426
INS No. A72-136-757

CARLOS ENRIQUE SILVA-JACINTO, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

Argued and Submitted Feb. 13, 2002
Decided June 11, 2002

ORDER

Before: D.W. NELSON, NOONAN, and HAWKINS, Circuit Judges.

The Memorandum disposition filed on March 5, 2002 is withdrawn. An amended Memorandum will be submitted for simultaneous filing with this Order.

The panel having amended the disposition, the Petition for Rehearing is DENIED. Judge Noonan voted to grant the Petition for Rehearing.

MEMORANDUM [1]

This petition for review challenges the INS's rejection of Silva-Jacinto's asylum petition on the basis that his fear of future persecution was not objectively reasonable. Both the Immigration Judge and the Board of Immigration Appeals found that Silva-Jacinto had a subjective fear of persecution and that his testimony was credible, reliable and consistent.[2] That testimony established that Silva-Jacinto was forcibly recruited into the Guatemalan armed forces, served honorably, but refused assignment to the G-2 division, an intelligence unit notorious for its human rights violations. The record compels the conclusion that Silva-Jacinto's refusal was based on his conscience and religious beliefs. The G-2 did not accept Silva-Jacinto's refusal and pursued him, even after his tour of military duty ended. The pursuit continued even after Silva-Jacinto moved to another city to avoid the G-2's entreaties. Silva-Jacinto was told that his "name would go on a list"—a statement that meant he was marked for death if he persisted in refusing to join the G-2. He thereupon fled Guatemala, entered the United States and later sought asylum.

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

[2] Consistency in this context means that the applicant's testimony at the IJ hearing was consistent with, that is, did not contradict, what was stated in the asylum application. *See, e.g., Singh v. INS*, 94 F.3d 1353, 1356 (9th Cir. 1996). Here, for example, it means Silva-Jacinto's testimony was consistent with his application's claim that the persecution was on account of protected grounds.

That Guatemalans who refuse the "invitation" to join the ranks of the G-2 are then routinely marked for execution—a proposition unchallenged by the INS—compels the conclusion that Silva-Jacinto's fears of future persecution were objectively reasonable. We grant Silva-Jacinto's petition, rather than remand this case for further proceedings, because the administrative record compels the conclusion that his fears of future persecution were based on a protected ground, pursuant to 8 U.S.C. § 1101(a)(42)(A). Silva-Jacinto presented uncontradicted and credible evidence that he feared G-2 persecution because of imputed political beliefs, particularly an allegiance to rival groups or subversives. He explained that G-2 forces think "that anyone who is not on their side or who refuses to join them is a subversive or a guerilla supporter and they are likely to put that person's name on a death list and have him killed." Because Silva-Jacinto was determined to be credible, his uncontradicted testimony that he was in danger because of his political opinion is sufficient. *See Del Carmen Molina v. INS*, 170 F.3d 1247, 1250 (9th Cir. 1999) ("While the guerrillas' threats may have been motivated *in part* by an interest in recruiting her, this does not defeat Molina's asylum claim") (emphasis original).

It is unnecessary for Silva-Jacinto to communicate to G-2 recruiters that he possessed a contrary political belief—such courage under the circumstances would veer toward the suicidal. Indeed, his not telling them the true grounds for his refusal lends credibility to his claim that he feared that they would believe he was opposed to them and consequently kill him.

In short, we hold that on this record, a reasonable fact finder would be compelled to conclude that Silva-

Jacinto had a well-founded fear of persecution and that this fear was based on statutorily protected grounds.

PETITION GRANTED.

NOONAN, Circuit Judge, dissenting.

Silva-Jacinto refused to serve in G-2 because of his religious beliefs and his unwillingness to torture and "kill people for no apparent reason." No evidence was presented that G-2 was aware of these beliefs. The record indicates only that Silva-Jacinto told military authorities that he didn't wish to serve because "I wanted to return to civilian life. I wanted to live with my wife in Bananera." G-2 persecution might have been based on simple refusal to serve, not a protected ground.

The case should be remanded to the BIA for further findings on whether such persecution would have been "on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A). Neither the Immigration Judge nor the BIA made a finding on this question.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-71426
INS No. A72-136-757

CARLOS ENRIQUE SILVA-JACINTO, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

Argued and Submitted Feb. 13, 2002
Decided March 5, 2002

MEMORANDUM [1]

Petition to Review a Decision of the Board of Immigration Appeals.

Before: D.W. NELSON, NOONAN, and HAWKINS, Circuit Judges.

This petition for review challenges the INS's determination that Silva-Jacinto is not eligible for asylum on the basis that his fear of future persecution was not objectively reasonable. Both the Immigration Judge

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

and the Board of Immigration Appeals found that Silva-Jacinto had a subjective fear of persecution and that his testimony was credible, reliable and consistent.[2] That testimony established that Silva-Jacinto was forcibly recruited into the Guatemalan armed forces, served honorably, but refused assignment to the G-2 division, an intelligence unit notorious for its human rights violations. Silva-Jacinto's refusal was based on his conscience and religious beliefs.[3] The G-2 did not accept Silva-Jacinto's refusal and pursued him, even after his tour of military duty ended. The pursuit continued even after Silva-Jacinto moved to another city to avoid the G-2's entreaties. Silva-Jacinto was told that his "name would go on a list"—a statement that meant he was marked for death if he persisted in refusing to join the G-2. He thereupon fled Guatemala, entered the United States and later sought asylum.

That Guatemalans who refuse the "invitation" to join the ranks of the G-2 are then routinely marked for

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[2] Consistency in this context means that the applicant's testimony at the IJ hearing was consistent with, that is, did not contradict, what was stated in the asylum application. *See, e.g., Singh v. INS*, 94 F.3d 1353, 1356 (9th Cir. 1996). Here, for example, it means Silva-Jacinto's testimony was consistent with his application's claim that the persecution was on account of protected grounds.

[3] Apparently recognizing the failure to raise the issue at any point in the proceedings below, the INS suggests that if we find Silva-Jacinto's fears to be objectively reasonable, the case should be remanded for a "factual" inquiry into the "on account of" requirement. The government cites no authority for this proposed disposition. By failing to raise the "on account of" issue during the entire proceedings and during the review process, the government has waived any such challenge. Moreover, our review of the record independently indicates ample proof that Silva-Jacinto has satisfied the requirement.

execution—a proposition unchallenged by the INS—compels the conclusion that Silva-Jacinto's fears of future persecution were objectively reasonable.

PETITION GRANTED.

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION APPEALS
Falls Church, Virginia 22041
DECISION OF THE BOARD OF
IMMIGRATION APPEALS

File No. A72 136 757

IN THE MATTER OF
CARLOS ENRIQUE SILVA-JACINTO

Oct. 5, 2000

IN DEPORTATION PROCEEDINGS

CHARGE:

Order: Sec. 241(a)(1)(B), I&N Act [8 U.S.C. § 1251(a)(1)(B)] - Entered without inspection[1]

APPLICATIONS: Asylum; withholding of deportation; voluntary departure

ON BEHALF OF RESPONDENT:

Antoinette Belonogoff, Esq.

ON BEHALF OF SERVICE:

Nancy S. Frankel
General Attorney

[1] Since amendments made by the Illegal Immigration Reform and Immigration Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat 3009 (enacted Sep. 30, 1996), do not affect the outcome of the case before us, references herein are made to the Immigration and Nationality Act ("I&N Act") as it existed prior to IIRIRA's enactment.

The respondent, a native and citizen of Guatemala, has appealed from an Immigration Judge's decision denying his applications for asylum and withholding of deportation under sections 208 and 243(h) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158, 1253(h). The appeal will be dismissed.

We agree with the ultimate conclusion of the Immigration Judge that the respondent has not demonstrated that he was a victim of past persecution or that he has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).

The respondent's claim is based upon his fear of harm for declining to serve in the military intelligence division ("G-2") of the Guatemalan military. We agree with Immigration Judge that the respondent's testimony and evidence, although credible, do not adequately demonstrate an objectively reasonable basis for his fear.

Any alien who premises an asylum claim on a well-founded fear of persecution, such as in the instant case, must demonstrate both a subjectively genuine and objectively reasonable fear *Arriaga-Barrientos v. INS*, 937 F.2d 411, 413 (9th Cir. 1991). While the subjective component is satisfied by "showing that the alien's fear is genuine," the objective component requires "credible, direct, and specific evidence in the record that would support a reasonable fear of persecution" *Singh v. INS*, 134 F.3d 962, 966 (9th Cir. 1998); *Prasad v. INS*, 47 F.3d 336, 338 (9th Cir. 1995). An asylum applicant need not show that persecution is "probable," only that it is a

"reasonable possibility." *INS v. Cardoza-Fonseca, supra.*

We agree with the Immigration Judge that the testimony and evidence of record do not indicate a "reasonable possibility" of future harm. The respondent, who had attained the rank of Second Sergeant in the Guatemalan military, returned to his hometown in 1990 after completing 2 years of compelled government service (Tr. at 16). He began work as a civilian with his father in a restaurant. While there, he was visited on two occasions by persons who attempted to persuade him to join the G-2. The respondent testified that these persons did not explicitly threaten him, but communicated only that he should "think about" joining their group (Tr. at 20-21, 28-29). The respondent did not testify that any particular threatening or harmful action took place during these visits other than this statement (Tr. at 20-21, 28-29). The respondent testified that he feared that he would be harmed because the G-2 was well-known for extra-judicial killing (Tr. at 22). When the respondent relocated to another town (Antigua), he observed black vehicles with tinted windows following him; however, the persons in the vehicles did not exit their car or specifically address him at any point (Tr. at 30-31). The respondent testified that, since his departure from Guatemala, his family has not told him of further visits from G-2 (Tr. at 48). The respondent submitted background information with his asylum application (Form I-589; Exh. 2), much of which is undated and from unidentified sources. These materials detail the terrible atrocities committed by the G-2 (especially against trade unionists and leftist guerrillas), as well as other human rights violations in Guatemala; however, they do not shed light on the

likelihood of the G-2 forces harming a former military sergeant who declined their invitation to join them, such as in the instant case.

Relevant to well-founded fear determination are the specific content of the testimony and any other relevant evidence in the record. *Matter of E-P*, 21 I&N Dec. 860, 862 (BIA 1997). In the instant case, the respondent's testimony and evidence, taken as a whole, do not adequately demonstrate that his fear of future harm is objectively reasonable. *INS v. Cardoza-Fonseca, supra*; *Singh v. INS, supra; Prasad v. INS, supra*; *Matter of Mogharrabi, supra.* Given the foregoing, we find no merit to the respondent's contention on appeal (Respondent's Brief at 6-9) that the Immigration Judge did not apply the appropriate standard of proof in this case.

Therefore, the appeal will be dismissed.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and in accordance with our decision in *Matter of Chouliaris*, 16 I&N Dec. 168 (BIA 1977), the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director; and in the event of failure so to depart, the respondent shall be deported as provided in the Immigration Judge's order.

[ILLEGIBLE]
FOR THE BOARD

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
San Francisco, California

File No. A72 136 757

IN THE MATTER OF
CARLOS ENRIQUE SILVA-JACINTO

Apr. 26, 1994

IN DEPORTATION PROCEEDINGS

CHARGE: Section 241 (a) (1) (B) of the Immigration and Nationality Act - Entry without inspection.

APPLICATIONS: (1) Section 208 of the Immigration and Nationality Act – Asylum.

(2) Section 243(h) of the Immigration and Nationality Act – Withholding of deportation.

(3) Section 244(e) of the Immigration and Nationality Act – Voluntary departure.

ON BEHALF OF RESPONDENT:

Antoinette Belonogoff, Esq.
2219 43rd Avenue
San Francisco, California 94116

ON BEHALF OF SERVICE:

Leslie Ungerman, Esq.
General Attorney
INS – San Francisco

ORAL DECISION OF THE IMMIGRATION JUDGE

Respondent is a twenty-three year old male, native and citizen of Guatemala who entered the United States without inspection near San Ysidro, California on or about April 17th, 1991.

Respondent admitted the truthfulness of the factual allegations contained in the Order to show Cause (Exhibit 1) and conceded deportability. Based upon respondent's admissions, deportability has been established by clear, convincing and unequivocal evidence. *Woodby v. INS*, 385 U.S. 276 (1966) and 8 C.F.R. 242.14(a).

Because the respondent declined to designate a country of deportation, the Court, pursuant to Section 243(a) of the Immigration and Nationality Act (hereinafter referred to as the Act), designated Guatemala should such action become necessary.

As relief from deportation, the respondent submitted an application for political asylum pursuant to Section 208 of the Act (Exhibit 2) which is also considered a request for withholding of deportation pursuant to Section 243(h) of the Act.

In the alternative, the respondent has applied for the privilege of voluntarily departing the United States in lieu of an Order of Deportation pursuant to Section 244(e) of the Act.

Pursuant to 8 C.F.R. 208.11, the respondent's application for asylum was forwarded to the Department of State, Bureau of Human Rights and Humanitarian Affairs, for an Advisory Opinion. The Advisory Opinion indicated that the BHRHA reviewed the application and had no additional information or analysis (Exhibit 3). This has been furnished to respondent and his counsel for their inspection and rebuttal. The Opinion has been considered in the writing of my decision.

The record also consists of documentary evidence submitted by the respondent at the time that he presented his application for asylum before the Asylum Officer of the Immigration and Naturalization Service. That background information included the respondent's own detailed declaration in the English language which had been translated to him in Spanish and signed on July 15th, 1992 (part of Exhibit 2), and photographs of the respondent which he has identified today taken while wearing his military uniform, as well as a number of articles regarding background information of the conditions in Guatemala and specifically, actions taken by the G-2, a part of the Guatemalan military, or at least whose actions are condoned by the Guatemalan military (part of Exhibit 2).

To be eligible for asylum, respondent must establish a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. For Section 243(h) relief, he must show a real likelihood or a clear probability that his life or freedom would be threatened for the same reasons. Relief is discretionary under Section 208 and mandatory under Section 243(h). See *Cardoza-Fonseca v. INS*, 480 U.S. 421 (1987); *INS v. Stevic*, 467 U.S. 407 (1984).

The Board of Immigration Appeals (hereinafter the Board) has clarified the meaning of the well-founded fear standard by explaining that an applicant has established a well-founded fear if a reasonable person in his circumstances would fear persecution. *Matter of Mogharrabi*, Int. Dec. 3028 (BIA 1987). In determining whether an alien has meet his burden of proof concerning the establishment of a "well-founded fear" of persecution, the Courts and the Board recognize the difficulty faced by aliens in obtaining corroborative documentary evidence of their claim. It therefore has been held in *Mogharrabi* that the alien's own testimony can "suffice where the tesimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear".

General evidence of oppressive conditions in an alien's home country is relevant to support specific information relating to an individual's well-founded fear of persecution. *Zavala-Bonilla v. INS*, 730 F.2d 562 (9th Cir. 1984).

An alien must point to specific, objective facts that support an inference of past persecution or a risk of future persecution. The objective facts can be established through credible and persuasive testimony by the alien. Once such subjective evidence has been presented, the alien's subjective fear and desire to avoid a risk-laden situation become relevant. *Cardoza-Fonseca v. INS, supra.* An alien's testimony is extremely important because individuals applying for asylum are often limited in the evidence which they can obtain to show persecution. *Platero-Cortez v. INS*, 804 F.2d 1127 (9th Cir. 1986).

Respondent testified that he fears persecution in Guatemala because he previously was a member of the

armed forces and held positions of corporal and sergeant before being honorably discharged. Additionally, he indicates that he has been asked and pressured by members of the military to become involved with an organization known as G-2. The respondent testified that he was approached prior to his discharge from the military in Guatemala and asked to become incorporated with this investigative branch which is known to involve persons who are suspected of acts. Rather than complete investigations, the individuals within G-2 sometimes torture and even kill persons without ever reaching any final conclusion in an investigation.

The respondent testified that he does not agree with the manner in which the G-2 works. He said that many people were shot and killed for no apparent reason and he is not in agreement with this for religious reasons besides.

The respondent was released from the military in April of 1990 after having served two and one-half years following a forced recruitment. He was able to return to his family home in Morales Izabal. There, he joined his father in a restaurant venture and was working for purposes of making a life for himself, his common-law wife, and their daughter. However, persons he believes were affiliated with G-2 came to the restaurant and asked him if he was involved with anything besides that venture. They also asked him why he had not accepted the invitation to join G-2. One of these individuals was known to the respondent while in the military, although not a friend. The respondent answered that he did not want to join the G-2 and work them [*sic*] because he had only been in the army for the required period of time and had no further interest in making it a career or having any further involvement.

After that visit from the two men, the respondent was visited one more time by two other unknown persons who arrived at the restaurant. They were wearing civilian clothes and he suspects that they were members of G-2 for several reasons. First, they knew his name and where he worked. Next, they asked him about his army time and why he had not stayed in the army. He answered again that he had only been involved with the army as long as was required. They asked him whether he didn't want to become a "specialist" and he understood this to mean that he would become involved with the G-2 and would have a good salary. He felt threatened by these two unknown men since they knew so much about his background. He felt they could kill him for no apparent reason since he had refused to follow their desires for him to involve himself again in the military, specifically G-2. He believes that these men or any others within the G-2 could retaliate and kill him because he was not in agreement with them and what they were doing.

According to the respondent, he left the restaurant and the family business to go to Antigua, Guatemala where his wife's family lived. There, he felt that he was under surveillance of persons in the G-2 because he saw dark cars with dark windows. He did not feel comfortable, although he was not approached directly in Antigua. He engaged in some type of employment there off and on, selling clothes, etc., but felt he was not safe. For that reason he return to his hometown, borrowed money and then left Guatemala approximately early January of 1991.

Through the course of his testimony, and in comparing that with his statement attached to his application, there is some indication that the respondent is not

clear as to dates or particular periods of times when he stayed in one place or another. However, it is clear from his testimony that he was approached on two separate occasions and on both of these, he believed that the individuals were members of the G-2. For this reason, he is fearful or returning to Guatemala and thinks that they may still be interested in him.

According to the respondent's testimony, his family remains in the town of Morales Izabal where his daughter is with his parents. Although he believes that the G-2 may have been there looking for him, he has no independent knowledge of that. It is just a suspicion on his part since he has never heard this from members of his family. He believes they may not have told him because they know that he is very fearful of this organization.

The respondent's statements concerning his fears of the G-2 are very generalized. It appears that the respondent was a member of the military and may have been of interest for further involvement but has declared that he does not want to be with the G-2 or have anything further to do with the military. He was released from military duty in April of 1990 and there is no indication that the military has tried to recruit him again other than these two independent incidents which the respondent believes involved G-2 persons.

Upon moving to Antigua, there is no indication that the G-2 had any further contact with either him or any member of his family. Although the respondent fears dark cars with dark windows, there is no indication independently that these men in the car were members of the G-2 or that they had any interest in this respondent or in any member of his family.

The documentary evidence of record is of a generalized nature and has been considered for the purpose of informing the Court as to the fact the G-2 exists and that it is a violent section of the military. Such evidence is not entitled to great weight. There must be specific facts or circumstances which lend themselves to the proposition that there is an objective basis for this person to have a well-founded fear of persecution in order to qualify under Section 208 of the Act.

The issues regarding the respondent's credibility have been brought into some question because of his inability to remember dates and specific periods of time. However, in taking all of his testimony into consideration, as well as his demeanor while testifying, the Court is satisfied that the respondent has testified to the best of his knowledge and was credible before this Court. It will not attach any special significance to any inconsistencies and in no way bases its decision on such inconsistency. The Court finds that the respondent has testified with candor and earnestly fears persecution if he is required to return to Guatemala. However, his subjective fears and beliefs standing alone are insufficient to establish a well-founded fear of persecution.

Upon consideration of all of the evidence of record, I find that the respondent has failed to present specific facts establishing that he has a well-founded fear, that he has actually been the victim of persecution or has a well-founded fear that he will be singled out for persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. Therefore, it must be concluded that he has failed to establish a well-founded fear of persecution within the meaning of Section 208 of the Act.

Since the respondent has failed to establish a well-founded fear of persecution, it follows that he also has failed the heavier showing required to demonstrate a "clear probability of persecution" necessary to be granted withholding of deportation under Section 243(h) of the Act.

The respondent has also applied for the privilege of voluntary departure. As he appears to be statutorily eligible for that relief, in the exercise of discretion, voluntary departure will be granted.

ORDER:

IT IS HEREBY ORDERED that the application for political asylum be denied.

IT IS FURTHER ORDERED that the application for withholding of deportation be denied.

IT IS FURTHER ORDERED that the respondent be granted the privilege of voluntary departure on or before July 1st, 1994, or any extension as may be granted by the District Director.

IT IS FURTHER ORDERED that if the respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without any further notice or proceedings and the following orders shall thereupon become immediately effective. Respondent shall be deported from the United States to Guatemala on the charge contained in the Order to Show Cause.

/s/ BETTE KANE STOCKTON
BETTE KANE STOCKTON
Immigration Judge

Supreme Court, U.S.
FILED
NOV 22 2002
THE CLERK

No. 02-377

In The

Supreme Court of the United States

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

v.

CARLOS ENRIQUE SILVA-JACINTO,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT

Respondent Carlos-Enrique Silva-Jacinto respectfully submits this statement in response to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, which the Immigration and Naturalization Service ("INS") filed in this case. The INS asserts its petition should be held pending this Court's disposition of two other petitions, which this Court has now granted. *See INS v. Chen*, No. 02-25 (cert. granted Nov. 12, 2002), and *INS v. Ventura*, No. 02-29 (cert. granted Nov. 4, 2002). In its decision in the *Ventura* case, the Court summarily reversed a Ninth Circuit decision on the ground that the Ninth Circuit should not have decided a particular issue in the first instance but instead should have remanded the matter to the Board of Immigration Appeals. Respondent recognizes the INS will argue *Ventura* controls this case. Therefore, respondent does not oppose this Court adhering to its customary practice of granting the INS's petition, vacating the judgment of the Court of Appeals and remanding the instant case to the Ninth Circuit for further proceedings consistent with the *Ventura* opinion.

DATED: November 22, 2002

Respectfully submitted,

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